No. 84-1070

IN THE

Supreme Court of the United States

October Term, 1984

LARRY WITTERS,

Petitioner,

v.

THE STATE OF WASHINGTON COMMISSION FOR THE BLIND,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF OF THE RUTHERFORD INSTITUTE, THE RUTHERFORD INSTITUTE OF ALABAMA, THE RUTHERFORD INSTITUTE OF GEORGIA, THE RUTHERFORD INSTITUTE OF MINNESOTA, THE RUTHERFORD INSTITUTE OF MONTANA, THE RUTHERFORD INSTITUTE OF TENNESSEE, THE RUTHERFORD INSTITUTE OF TEXAS, AND THE RUTHERFORD INSTITUTE OF VIRGINIA, AMICI CURIAE, IN SUPPORT OF THE PETITIONER

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TABLE OF CONTENTS

TABLE OF CASES

Cases

Other Sources

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INTEREST OF AMICI CURIAE*

This case presents important issues concerning invidious discrimination against handicapped persons receiv-

*Counsel of record to the parties in the case described above have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 36.

ing public benefits. The Petitioner in this case has been denied benefits solely on account of his religious beliefs and commitments. The Rutherford Institute is greatly concerned about the implications for religious freedom and tolerance raised by the Supreme Court of Washington's decision in this case.

The Rutherford Institute believes that the Supreme Court of Washington erred when it ruled that the provision of state aid to a blind person studying for the religious ministry violated the Establishment Clause of the First Amendment. The benefits in question are provided for the secular purpose of training the blind to be self-reliant and productive citizens. It does not follow that the use of such benefits to obtain a religious education "establishes" religion. To the contrary, a state policy which excludes a person from generally available benefits, solely on religious grounds, constitutes invidious discrimination and places an impermissible burden upon that person's free exercise of religion.

Amici Curiae are non-profit religious corporations named for Samuel Rutherford, a 17th-century Scottish minister and Rector at St. Andrew's University. With state chapters in Alabama, Georgia, Minnesota, Montana, Tennessee, Texas and Virginia and its national office in Manassas, Virginia, the Rutherford Institute undertakes to assist litigants and to participate in significant cases relating to First Amendment religious freedoms. Counsel for *Amici Curiae* have specialized in constitutional litigation in state and federal courts, including the Religion Clauses of the First Amendment, and have participated as counsel for *amici curiae* in previous cases before this Court. Counsel John W. Whitehead has argued and served as special constitutional consultant in numerous First Amendment cases and has authored several books and law review articles that focus on interpretation and application of the First Amendment Religion Clauses. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

SUMMARY OF ARGUMENT

In today's welfare state, it is inevitable that tangible and intangible benefits arising from federal and state governmental programs will inure to religious persons and groups. Whether or not benefit programs violate constitutional norms ultimately depends upon the relative posture of religion in the context of the state's program on the entire class benefitted. Except for the Court's "school aid" cases, e.g., *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973), *Meek* v. *Pittinger*, 421 U.S. 349 (1975), and *Wolman* v. *Walter*, 433 U.S. 229 (1977), where the Court has adopted a "secular-use" requirement for such benefits to be constitutional, this Court has approved without qualification public assistance made available to a broad spectrum of persons or groups on a neutral basis. *Mueller* v. *Allen*, 77 L.Ed.2d 721 (1983); *Widmar* v. *Vincent*, 454 U.S. 263 (1981); *Roemer* v. *Maryland Board of Public Works*, 426 U.S. 736 (1976); *Everson* v. *Board of Education*, 330 U.S. 1 (1947). In this case, but for the Respondent's action, vocational assistance would be provided to *all* blind people on a neutral basis and, as such, would not benefit religion any more than police and fire protection, tuition tax credits, social security or any other form of public assistance made available to a broad class of persons constituting the general public. Were such assistance denied because of its potential incidental benefit to religious persons or groups, the Establishment Clause would be transformed into an instrument to repress religion and religious persons and groups from all aspects of public life. *McDaniel* v. *Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring).

The denial of benefits to Petitioner also constitutes an impermissible burden upon the free exercise of Petitioner's religious beliefs. The state cannot condition the availability of public benefits upon conduct mandated by Petitioner's religious beliefs, thereby causing him to modify his behavior or violate his beliefs. *Thomas* v. *Review Board*, 450 U.S. 707 (1981); *McDaniel* v. *Paty*, 435 U.S. 618 (1978); *Sherbert* v. *Verner*, 374 U.S. 398 (1963). Therefore, Respondent's denial of benefits violates the Free Exercise Clause.

The denial of benefits also constitutes invidious discrimination under the Equal Protection Clause of the Fourteenth Amendment. The state has placed Petitioner in a different class from other eligible aid recipients, solely on religious grounds, and discriminated by denying public benefits on that basis. The distinctions drawn are, thus, subject to strict scrutiny and must be justified by a compelling state interest. *United States* v. *Carolene Products Co.*, 304 U.S. 144 (1938); *Widmar* v. *Vincent*, 454 U.S. 263 (1981); *Zobel* v. *Williams*, 457 U.S. 55 (1982). Analyzing this case under the tri-partite test of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1977), the putative Establishment Clause obligations advanced by the state do not constitute a compelling state interest, *Cf. Widmar* v. *Vincent*, 454 U.S. 362 (1981).

ARGUMENT

I.

The Establishment Clause Does Not Prohibit The Participation Of Religious Persons In Pure Public Benefits Accruing To A Broad Class Of Beneficiaries And Does Not Require That Such Benefits Be Used Only For Secular Purposes.

A. True Public Benefit Programs Have Never Been Thought Unconstitutional Even Though Religious Persons And Institutions Thereby Obtain Substantial Benefits.

This Court has long recognized the right of religious persons and institutions to participate on an equal basis with others in benefits flowing from general welfare legislation. *See, e.g., Everson* v. *Board of Education*, 330 U.S. 1, 17-18 (1947) (Church schools entitled to benefits of general government services such as ordinary police and fire protection, connections for sewage disposal, and public highways and sidewalks). The most purely public forms of such benefits in which religious institutions participate have never been thought to pose any constitutional problem, even though they represent a benefit in some sense to religion. *Roemer* v. *Maryland Board of Public Works*, 426 U.S. 736, 746-47 (1976) (Court never has held that church cannot receive general benefits such as police and fire protection).

In today's welfare state, it is inevitable that both tangible and intangible benefits arising out of federal and state government programs will inure to religious persons and groups. *Id.* at 745. Such aid is justified, not because there is no benefit conferred upon religion, but because religious groups or individuals participate on a *neutral* basis with other members of the benefitted class. In such a case, religious members of the class do

not actually benefit *relative* to other members.[1] The critical constitutional inquiry is, thus, not the degree or substantiality of the benefit to religion in an absolute sense,[2] but the relative posture of religion in the context of the impact of the state's program on the entire class.

B. This Court's Decisions Invalidating Certain Forms Of Aid To Religious Schools Did Not Involve True Public Benefit Programs.

The principle that religious persons may share in public benefits, although absolute as applied to true public benefit programs, applies less perfectly in cases dealing with governmental aid to private religious schools. This Court has held in those cases that the state may assist a private religious school with its secular function, but may not provide aid which is not specifically limited to such secular function or use. *See generally, Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973); *Meek* v. *Pittinger*, 421 U.S. 349 (1975); *Wolman* v. *Walter*, 433 U.S. 229 (1977). Most of the school-aid cases involve attempts to distinguish the reach and effect of different

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[1]For this reason the neutral participation of religious persons in public benefits is not simply a *de minimis* advancement of religion, nor even necessarily a benevolent accommodation of religion. Rather it is merely the most neutral course for government to take, and therefore the course which most fully realizes the values embodied in the Establishment Clause. *Cf. Roemer v. Maryland Board of Public Works*, 426 U.S. 736, 747 (1976) (neutral government action may encompass incidental benefit to religion).

[2]The degree of benefit does not determine constitutionality, for even programs that substantially benefit religion have been upheld by this Court. *See Mueller v. Allen*, 77 L.Ed 2d 721, 729 n. 5 (1983) (religions may benefit substantially from government action but this does not require the conclusion that the Establishment Clause is violated).

programs purporting to fit within the limitation it imposes.[3]

This Court's application of the "secular-use" test in the school-aid cases reflects the fact that those cases did not involve true public benefit programs. Instead, those cases involved aid to a class of beneficiaries composed predominantly of private religious schools. The various kinds of secular-use restrictions attached to such aid by the state legislatures evince their conscious orientation to religious schools as a primary target of the aid.[4] No secular-use restriction would be necessary unless it were anticipated that the class of beneficiaries would include religious institutions. Moreover, such a restriction would presumably not even be expedient unless a significant percentage of the beneficiaries were religious schools. Hence, the inclusion of such a limitation in an aid provision presupposes that the program may not be a true

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[3]Thus, this Court determined, *inter alia*, in *Lemon v. Kurtzman*, 403 U.S. 602, 619-20 (1971), that a salary supplement for teachers at a private religious school, although designed to support only the teaching of secular subjects, was unconstitutional because of the continuing state surveillance required to insure that the subsidized teachers did not engage in religious teaching. Applying a similar test, this Court approved federal grants for the construction of buildings at church-related colleges on the theory that the permanent restriction of such buildings to secular use brought this aid safely within the secular use limitation. *Tilton v. Richardson*, 403 U.S. 672, 682-84 (1971). In *Committee for Public Education v. Nyquist*, 413 U.S. 756, 783 (1973), this Court struck down, *inter alia*, a provision authorizing direct money grants to private religious schools, again because there was not sufficient assurance that the aid would be put to secular use.

[4]The salary supplements in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), for example, were deliberately designed to benefit private schools. The District Court found that 95% of the pupils attending private schools were attending parochial schools. *Id.* at 608.

public benefit program and, *ipso facto*, gives rise to greater scrutiny of the use of the benefits granted.

The justification for this Court's approval of a school-aid program thus does not lie in the fact that religious schools were incidental members of a class of beneficiaries of a neutral public program. Rather, it is that religious schools were the predominant class of beneficiaries and therefore subject to the secular use restriction. By a parity of reasoning, those cases disapproving aid to religious schools do not represent an exception to, or an erosion of, the public benefit principle. All of these cases are, rather, better explained in terms of the secular-use restriction.[5] That restriction should be recognized as a

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[5]The dichotomy between secular and religious use, as employed to test the constitutionality of aid to religious schools, may be understood as an imperfect analogue of the public benefit concept. In this view, secular use of government aid by a religious school corresponds to benefits accruing to secular members of the class, and religious use of such aid corresponds to benefits accruing to religious members of the class. Thus, a program limiting aid to secular use is not unconstitutional merely because it also has the direct and "incidental" effect of benefitting the school's religious mission. *Cf. Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 775 (1973) (indirect and incidental effect does not render legislation unconstitutional).

The logic supporting the secular-use test naturally bears some resemblance to the justification proffered for public benefit programs, because both derive from the fundamental principle of neutrality. Thus, many of the decisions dealing with aid to religious schools discuss the public benefit principle. *E.g.*, *Roemer* v. *Maryland Board of Public Works*, 426 U.S. 736, 746-47 (1976). However, the analogy between the two is imperfect and breaks down at several points due to the peculiar technical problems that inhere in attempting to carve out secular functions from the religious mission of a religious school. Thus, for example, a school-aid program may be unconstitutional if continuing surveillance is required to preserve the secular-use limitation, even though there is in fact no religious use. *Meek* v. *Pittinger*, 421 U.S. 349 (1975). The requirement of continuing surveillance arises out of the particular context of aid to a religious school and is unrelated to the public benefit concept.

discrete exception—wholly separate from the public benefit principle—to the general rule that government may not constitutionally provide direct aid to a religious institution.

C. The Washington Supreme Court Erroneously Applied The Secular-Use Test To Assistance Provided To Petitioner Under The State Of Washington's Neutral Public Benefit Program.

The case before this Court, in contrast to the school-aid line of cases, involves a true public benefit program. Under the program established by the State of Washington, financial assistance is made available on a *neutral* basis to all visually handicapped persons pursuing an education in the "professions, business or trades." *Witters* v. *State Commission for the Blind*, 689 P. 2d 53, 55 (Wash. 1984). Even the Washington Supreme Court recognized that the program "is neutral in that benefits are provided to the student irrespective of the type of school attended or the degree sought . . . ." Notwithstanding the breadth of the class of beneficiaries in the present case, however, the Washington Supreme Court errone-

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(footnote 5 continued)

Moreover, certain formalistic differences between the secular-use test and the public benefit principle make it difficult to extend doctrinal distinctions made with respect to the secular-use limitation to the public benefit context. For example, although the secular-use test permits an indirect and incidental benefit to religion, it does not permit any direct application of funds to religious purposes. The distinction between direct and indirect benefits is central to the operation of the secular-use test, and, on the level of analogy, may be understood as implementing the notion that religious members are only benefitting incidentally. But this does not mean, as the Washington Supreme Court seemed to think, that the public benefit concept must be applied to prevent any actual use of funds for religious purposes. This mistake has to do with confusing the analogy between the two doctrines and the formal operation of the tests themselves. It is an attempt to speak on a formal level in a language that has meaning only on an analogical level.

ously concluded that vocational assistance to Petitioner had the primary effect of advancing religion because it enabled him to "become a pastor, missionary, or youth director . . . ." *Id.* at 56. In doing so, it improperly applied a variant of the secular-use test, which it took from school-aid cases,[6] to require that no religious use be made of state funds.

1. The Breadth Of The Class Of Beneficiaries Of Washington's Vocational Assistance Program—All Visually Handicapped Students Pursuing Education In The Professions, Business Or Trades—Demonstrates That The Program Is A True Public Benefit Program Under This Court's Recent Decisions.

This Court's recent decisions suggest that the breadth of the class benefitted by a government program has an important, if not determinative, bearing on whether the program should be treated as falling within the public benefit principle. In *Widmar* v. *Vincent*, 454 U.S. 263, 274 (1981), this Court clearly stated that "[t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect." The breadth of the class benefitted also served as a vital distinction between the tuition assistance invalidated by this Court in *Committee*

[6]The court below relied on the formulation of the secular use limitation developed by this Court in *Hunt* v. *McNair*, 413 U.S. 734 (1973), and particularly on the second prong which prohibited funding of "a specifically religious activity in an otherwise substantially secular setting." *Id.* at 743. As further discussed below, this test must be taken as limited to the school-aid context in order to give effect to this Court's decisions with regard to public benefit programs. *See, e.g., Roemer* v. *Maryland Board of Public Works*, 426 U.S. 736, 747 (1976).

for Public Education v. *Nyquist*, 413 U.S. 756 (1973), and the tuition deduction upheld by this Court in *Mueller* v. *Allen*, 77 L.Ed.2d. 721, 731 (1983). Unlike the public assistance in *Nyquist*, which was available *only* to parents of students in private schools, the tuition deduction at issue in *Mueller* was available to *all* parents regardless whether their children attended private or religious schools. *Id.* at 731.

Despite the inclusion of parents of public school children in the *Mueller* plan, "the vast majority of the taxpayers who [were] eligible to receive the benefit [were] parents whose children attended religious schools." *Id.* at 734 (Marshall, J., dissenting). The program, therefore, fell somewhat short of being a pure public benefit program. On the other hand, the inclusion of parents of children attending public schools did serve to differentiate the case from the traditional form of the school-aid case. *Mueller* thus stands as a link between the cases comfortably within the traditional public benefit analysis and the school-aid cases applying the secular-use limitation.

If the breadth of the class of beneficiaries in *Mueller*, which dealt with what might be termed a quasi-public benefit program, served to vitiate any conflict between that program and the Establishment Clause, then *a fortiori*, the breadth of the class of beneficiaries in the present case, which involves a paradigmatic public benefit program, ought to place the vocational assistance to Petitioner safely beyond constitutional challenge.

2. Applying The Secular-Use Test To Neutral Public Benefit Programs Would Extend The Reach Of The Establishment Clause To All Forms Of Social Welfare Programs, Including Social Security Benefits, G.I. Bill Payments, And Federal Student Loans, Thus Converting The Clause Into A Sword Against Religion.

The secular-use test, which furthers neutrality in the context of aid to a religious school, plainly undermines neutrality when applied to a true public benefit program, such as the one at issue in this case. Indeed, the court below conceded that the program was neutral in its overall effect, but, analyzing the assistance to Petitioner independently of the program itself, determined that permitting such religious use of state funds violated the Establishment Clause. *Witters* v. *State Commission for the Blind,* 689 P.2d at 256.

The notion that the Establishment Clause absolutely bars any religious person from using benefits obtained pursuant to neutral, general welfare legislation has far-reaching implications. For example, Social Security benefits and G.I. Bill payments could no longer be put to religious use by religious persons. Similarly, such a construction of the Establishment Clause would seem to place in doubt the constitutionality of federal student loans to students in divinity or theology programs at otherwise secular universities. Indeed, the use of public facilities by religious groups on the same basis as other groups, although clearly sanctioned in *Widmar* v. *Vincent*, would not be permitted under the logic advanced by the lower court.

The reach of the Establishment Clause, under the approach suggested by the Washington Supreme Court,

would be virtually limitless. Thus unsheathed, the Clause would become a "sword to justify repression of religion or its adherents from any aspect of public life." *McDaniel* v. *Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring). Given the ubiquitous reach and influence of state and federal governments, the hermetic separation urged by Respondent and endorsed by the lower court would have the effect of driving religion from virtually every sphere of societal activity. The Establishment Clause would then operate as a license to subject religious groups or individuals "to unique disabilities." *Id.*

Although Respondent may urge that the decision of the court below is narrow and limited only to the use of government funds for religious education, as opposed to other religious uses, there is nevertheless no constitutional basis for such a distinction. *Mueller* v. *Allen*, 77 L.Ed.2d 721 (1983). Moreover, the interpretive problems that would arise in determining whether a particular use constituted a religious use would pose a grave risk of "entanglement".[7] As this Court recognized in *Widmar* v. *Vincent*, "[t]his alone could prove an impossible task in an age where many and various beliefs meet the constitutional definition of religion." 454 U.S. at 272, n.11; *cf. Malnak* v. *Yogi*, 440 F. Supp. 1284 (D.N.J. 1977), *aff'd per curiam*, 592 F. 2d 197 (3rd Cir. 1979). It was for precisely this reason that this Court refused to permit state inspection and evaluation

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[7]The approach taken by the Washington Supreme Court would seem to require the State to determine what constitutes "religious use" of the State's funds. Would the taking of theology courses, as a part of a humanities program at a secular university, constitute a forbidden religious use? The focus of the court below on the use of benefits by recipients rather than on the nature of the program itself necessarily leads to such entangling and imponderable questions.

of parochial school expenditures in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).

3. The Secular-Use Test Should Be Restricted To Traditional School-Aid Cases And Should Not Be Applied To The State Of Washington's Program Merely Because Some Assistance Flows Ultimately To A Religious Institution.

The conflict between the Establishment Clause and social welfare programs arises from attempting to apply the secular-use limitation outside of its proper context as a limitation on the provision of aid to a religious school. It might be argued that the present case involves indirect aid to a religious school and is, therefore, an appropriate occasion for invocation of the secular-use test. But the mere fact that some aid may ultimately trickle down to a religious institution, or be applied to religious education, does not vitiate the public character of an otherwise neutral program.

The public character of the program derives from the broad class of beneficiaries and is logically unrelated to the particular use of the assistance made by any given religious member. Religious education is not a talisman which automatically taints the constitutional quality of public assistance. Indeed,this Court indicated in *Mueller* v. *Allen*, 77 L.Ed.2d 721,730 (1983), that a scholarship program modelled after the tuition deductions approved in that case might well pass constitutional muster.

Moreover, with the exception of *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973), all of this Court's recent decisions invalidating state aid to religious schools have involved "the direct transmission of assistance from the state to the schools themselves."

Mueller v. *Allen*, 77 L.Ed.2d at 731. The spectre that individuals will be indirectly used as conduits through which massive amounts of aid will be channelled to religious schools is not present in this case. The attenuated benefit that a religious institution might derive from Petitioner's participation in Washington's vocational assistance program is manifestly not one of "the evils against which the Establishment Clause was designed to protect." *Id.* To borrow from this Court's observations in *Mueller*, "the historic purposes of the Clauses simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices" of a few blind students, that "eventually flows to parochial schools from the neutrally available" vocational assistance at issue in this case. *Id.*

Petitioner's application of vocational assistance toward certain religious studies does not convert this into a school-aid case. The secular-use limitation is, therefore, wholly inappropriate. The considerations that make it reasonable to apply the secular-use limitation in the context of aid to religious schools are simply not present in this case.

D. The Decision Of The Washington Supreme Court Is Irreconcilable With This Court's Decisions Upholding Neutral Public Benefit Programs And Represents A Significant Step Towards A Secularism Inconsistent With This Nation's Religious Heritage.

This Court has repeatedly emphasized that incidental benefits to religion flowing from public welfare legislation are consistent with the Establishment Clause. *See, e.g., Mueller* v. *Allen*, 77 L.Ed.2d at 726-27. Indeed, government action in singling out and excluding religious persons from public benefits violates the Establishment Clause which prohibits not only government action that

advances religion, but also government action that inhibits it. *Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971). The neutral course between these two extremes may at times be difficult to chart, but the action of the Commission in the instant case—denying a blind man vocational assistance because he engages in certain religious studies—falls outside the realm of legitimate speculation about the aims of the Establishment Clause. Such action represents manifest hostility toward religion, "preferring those who believe in no religion over those who do believe." *School District of Abington Township, Pa.* v. *Schempp*, 374 U.S. 203, 225 (1963), *quoting Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

Amici believe that the decision of the court below is consonant with the views of some that the Establishment Clause requires the secularization of American society. A decision by this Court upholding the denial of assistance to Petitioner would be interpreted by many as validating this thesis. Moreover, it could well be interpreted by public administrators and others in public authority as a mandate to remove all religious influence from the public sphere.

II.

The State of Washington's Denial of Public Benefits To Petitioner On Account Of His Intent To Become A Minister Establishes An Unconstitutional Condition Upon The Exercise Of Religious Liberty.

The Free Exercise Clause prohibits the State from denying public benefits because of conduct mandated by religious belief, or from conditioning the availability of a public benefit upon conduct proscribed by religious belief. *Thomas* v. *Review Board*, 450 U.S. 707, 717-18 (1981). The free exercise of religion encompasses not only the right to believe, but also the right to seek expression of that belief in a career as a minister. *McDaniel* v. *Paty*, 435 U.S. 618, 631 (1978) (Brennan, J., concurring). The State in this case denied Petitioner the benefits of its general welfare program specifically because he was preparing for a career as a pastor, missionary, or youth director. This imposition of a special burden upon the exercise of a fundamental religious right plainly violates the Free Exercise Clause.

This Court has rejected the argument that a legitimate distinction can be drawn, for Free Exercise Clause purposes, between religious belief and the expression of that belief in a career or calling. *Id.* at 626-27. Indeed, it would be risible to suggest that the right to believe ceases "to enjoy the protection of the First Amendment when held with such depth of sincerity as to impel one to join the ministry." *Id.* at 631 (Brennan, J., concurring).

The denial of vocational assistance to Petitioner establishes a religious classification governing the availablity of vocational assistance virtually identical, except for the form of the benefit at issue, to the classification invalidated by this Court in *McDaniel* v. *Paty*, 435 U.S. 618 (1978). In *McDaniel*, this Court struck down a provision of the State of Tennessee that made status as a minister a disqualifying factor for those seeking public office. This Court rejected the State's argument that the choice of a career as a minister was somehow less protected than religious belief itself. *Id.* Therefore, the classification established by the State of Washington disqualifying those seeking to become ministers from assistance under its program plainly constitutes a forbidden religious classification under the rule announced by this Court in *McDaniel*.

The difference in the type of benefit, financial assistance in this case and eligibility for public office in *McDan-*

iel, does not compel a contrary conclusion. This Court has held in several cases that the State cannot condition the availability of financial benefits upon violation of religious faith. *Thomas* v. *Review Board.*, 450 U.S. 707, 717-18 (1981) (unconstitutional to condition availability of unemployment compensation upon violation of religious faith); *Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963) (Same). The financial pressure placed upon Petitioner to forego his religious studies and perhaps even to seek a different career is unmistakable. Such pressure constitutes an unconstitutional burden upon religious exercise. "When the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." *Thomas* v. *Review Board*, 450 U.S. at 717-18.

As this Court has recognized, the freedom to engage in religiously impelled ministry involves the essence of religious liberty. *McDaniel* v. *Paty*, 435 U.S. at 626. The State has placed Petitioner in the untenable position of having either to relinquish this freedom and thus "violate a cardinal principle of his religious faith," or else to forfeit the benefits otherwise available under the State of Washington's vocational assistance program. *Id.* Therefore, the denial of benefits to Petitioner violates the Free Exercise Clause.

III.

The Commission's Denial of Benefits For Religious Reasons Constitutes Invidious Discrimination Against Petitioner In Violation Of The Equal Protection Clause Of The Fourteenth Amendment.

When fundamental and personal rights are at stake, this Court has subjected state classification of persons and objects to strict scrutiny. In the early case of *United States* v. *Carolene Products Co.*, 304 U.S. 144 (1938), this Court recognized that laws involving the right to vote, restraints on free speech, interference with political organizations, freedom of assembly, *and discrimination against religious, national or racial minorities*, require a "more searching judicial inquiry" under the Equal Protection Clause.

Since that time, the Court has identified certain classifications as "suspect" and others involving "fundamental rights," both of which are subjected to "strict scrutiny" by the Court and require a showing that there is a compelling state interest "necessary to the accomplishment of some permissible state objective." *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967). Classification in the area of race, religion and nationality have been deemed suspect because they affect discrete and insular minorities.[8]

Likewise, even though a law may be designed to serve neutral ends, if it is applied in a manner to discriminate on otherwise impermissible constitutional grounds, or if its impact or effect constitutes an equal protection viola-

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[8] *Strauder* v. *West Virginia*, 100 U.S. 303 (1880); *Hirabayashi* v. *United States*, 320 U.S. 81 (1943); *Korematsu* v. *United States*, 323 U.S. 214 (1944); *Takahashi* v. *Fish & Game Commission*, 334 U.S. 410 (1948); *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *McLaughlin* v. *Florida*, 379 U.S. 184 (1964); *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Hunter* v. *Erickson*, 393 U.S. 385 (1969); *Widmar* v. *Vincent*, 454 U.S. 263 (1981).

tion, then the statute as applied may be held unconstitutional. The classic statement of this principle was in *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886). In that case, the supervisors of the County and City of San Francisco were empowered in their discretion to regulate the operation of laundries in wooden buildings, while laundries operating in brick or stone structures were not subject to regulation. Consent to operate wooden laundries was given to non-Chinese subjects, but withheld from Chinese subjects. The Court stated:

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

118 U.S. at 373-374.

The equal protection principles set forth above clearly apply in the context of a public benefit case. As recently as *Zobel* v. *Williams*, 457 U.S. 55 (1982), this Court recognized that "when a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 60. Because the discrimination here is based on religion, the state must demonstrate a compelling state interest for the distinctions drawn between beneficiaries.

In this regard, *Widmar* v. *Vincent*, 454 U.S. 263 (1981), is helpful as a framework for analysis. There, a state discriminated against students' use of public facilities based on the religious content of their intended speech. This Court required the state to demonstrate a compelling state interest for its denial of use of the facilities. *Id.* at 267-270. The state's compliance with its Establishment Clause obligations failed to provide a sufficiently compelling state interest to justify the discrimination imposed against the students. *Id.* at 276.

In order for Establishment Clause obligations to be considered compelling in the present case, the Respondent must show, as in *Widmar*, that a public benefit program without a religious exclusion would violate the tripartite test found in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). *See Widmar* v. *Vincent*, 454 U.S. at 271. Applying this test, it is clear that the Establishment Clause does *not* compel Respondent to draw the distinction that it has drawn. First, there would be an obvious secular legislative purpose for the public benefits provided, i.e., to educate the blind and make them self-reliant and productive citizens of society. Second, the primary effect of the benefits would not be the advancement of religion, but the education of the handicapped. Any benefit to religion would be strictly "incidental." Benefits would accrue to *all* eligible persons, religious and nonreligious. Their use would depend upon private, individual choices, not upon state action or influence. It is difficult to discern any "imprimatur" of state approval of religion arising from such a program. In the absence of "empirical evidence" that benefits will be awarded predominantly to religious persons for religious uses, the primary effect of the program cannot be considered to be other than purely secular in nature. *Id.* at 275.

Finally, as this Court noted in *Widmar*, there is actually a greater risk of impermissible "entanglement" by excluding "religious" uses of public benefits. *Id.* at 272, n.11. What constitutes a "religious" use? Who will monitor and prevent such uses? Conversely, the neutral provision of benefits on an *equal* basis to *all* eligible

persons, regardless of their personal choices as to the use of such benefits, creates no entanglement problem.

It is, therefore, inconceivable that the state's Establishment Clause obligations in this case exceed those advanced in *Widmar*. There being no compelling state interest, the discrimination against Petitioner rests on impermissible constitutional grounds and must be invalidated by this Court.

CONCLUSION

Clearly, "[t]he purpose of the establishment clause was not to extirpate religion from public life." Comment, *Secularism in the Law: The Religion of Secular Humanism*, 8 Ohio N.U.L. Rev. 329 (1981). The mind frame of those who directed the constitutional era and the drive toward separation of church and state "was, in some respects, anti-clerical, as a result of Papism, Cromwellism, etc., but never antireligious, so that some interrelating and intermeshing of state and religion have always been with us." Forkosch, *Religion, Education, and the Constitution—A Middle Way*, 23 Loyola L.Rev. 617, 632 (1977).

The Washington Supreme Court decision runs contrary to this central historical and political truth. It could lead to the exclusion of religious persons from many, if not most, areas of public life. It is tantamount to a *de facto* establishment of what this Court has previously identified as a "religion of secularism." *School District of Abington Township, Pa.* v. *Schempp*, 374 U.S. 203, 225 (1963). *See also* Gianella, *Religious Liberty, Nonestablishment and Doctrinal Development*, 81 Harv. L.Rev. 513, 586-587 (1968) and *Torasco* v. *Watkins*, 367 U.S. 488, 495, n.11 (1961). As Harvard professor Harvey Cox has noted, secularism is an "ideology, a new closed world view which functions very much like a new

religion . . . It is a closed ism." H. Cox, *The Secular City* 18 (1965). It is a menace to freedom because it "seeks to impose its ideology through the organs of the State." *Id.*

The decision of the Washington Supreme Court conflicts with vital constitutional freedoms. It is, therefore, essential that the conflict be resolved in favor of the Petitioner.

Respectfully submitted,

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